Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187
	)	

COMMENTS AND OPPOSITION OF SPRINT CORPORATION

Sprint Corporation ("Sprint"), pursuant to Section 1.429(f) of the Commission's Rules, hereby responds to the petitions by AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI") and Southwestern Bell Telephone Company ("SWBT") for reconsideration of the Commission's *Report and Order*, FCC 97-23, released January 31, 1997 ("*Order*") in the above-captioned proceeding. Sprint's response here is limited to the petitioners' request that the Commission reconsider its interpretation of the "deemed lawful" language added to Section 204(a)(3) of the Communications Act by Section 402(b)(1)(A) of the Telecommunications Act of 1996. Sprint fully agrees with the position of AT&T and MCI that the Commission's interpretation of such language is unsupported and would lead to irrational results. Sprint also opposes the interpretation suggested by SWBT which would eliminate the applicability of Section 208 to the streamlined tariffs of the LECs.

As both AT&T and MCI have explained, the Commission's *Order* overturns well-established law governing the legal effect of

tariffs permitted to take effect without suspension and investigation and usurps the statutory right of a party to seek damages for tariffs later found to be unlawful for the period prior to a determination of unlawfulness. The Commission claims that its conclusion is "compelled by the [deemed lawful] language of the statute as interpreted by relevant judicial precedent." *Order* at ¶24. But the notion that these two words in Section 204(a)(3) require the Commission to totally eviscerate the damages remedy afforded by the Act's complaint process and deprive customers of dominant LECs of the primary means available under the Act to protect themselves from being over-charged or subjected to unreasonable or unjustly discriminatory terms and conditions is unsustainable.

In the *Notice of Proposed Rulemaking* ("*NPRM*") herein, the Commission stated that the "deemed lawful" language of Section 204(a)(3) is susceptible to at least two interpretations -- one that established a conclusive presumption of lawfulness and one that would only create a rebuttable presumption of lawfulness, thereby enabling a subscriber to such tariff to overcome such presumption in a complaint proceeding under Section 208 and, if successful, seek damages. The Commission now claims that its previous view was incorrect; that the term is unambiguous; and that it is required to presume as a conclusive matter that the streamlined tariffs of the LECs that are allowed to take effect without suspension and investigation are lawful. But the

Commission's finding that the term "deemed lawful" clearly establishes a conclusive presumption of lawfulness is contradicted by the fact that the Commission still reserves the right to find any streamlined tariff of a LEC unlawful in a subsequent Section 205 investigation or Section 208 complaint proceeding. *Order* at ¶21. As MCI points out, a presumption of lawfulness that is "time-limited" can hardly be considered "conclusive." MCI Petition at 5. At most, the Commission has established a rebuttable presumption and such presumption cannot override a customer's statutory right to secure damages for being subjected to tariffs that are eventually found to be unlawful.

The Commission states that its finding here is based upon and consistent with case precedent. However, the two appellate decisions it cites provide little, if any, support for its decision that the language of Section 204(a)(3) must be read as establishing a "conclusive presumption" of lawfulness. Both cases -- *Municipal Resale Service Customers v. Federal Energy Regulatory Commission*, 43 F.3d 1046 (6th Cir. 1995) and *Ohio Power Company v. Federal Energy Regulatory Commission*, 954 F.2d 779 (D.C. Cir. 1992) -- deal with a unique feature of the energy rate regulatory scheme which requires the Securities and Exchange Commission (SEC) and not the Federal Energy Regulatory Commission (FERC) to approve contracts between subsidiaries of a public utility holding company, including the transfer price of coal purchased by an electric power company from an affiliate mining

company. FERC regulation of a utility's wholesale electric rates accommodates the SEC's jurisdiction in this regard by "deeming" the transfer price subject to the jurisdiction of the SEC to be reasonable for purposes of determining the lawfulness of such utility's wholesale rates. Plainly, the basis for the FERC's and presumably the courts' interpretation of such rule, *i.e.*, the need to accommodate the division of responsibilities in the regulation of energy prices between FERC and the SEC, has no relevance in the context of communications regulation. The LEC-initiated tariffs that would take effect under the streamlined procedures of Section 204(a)(3) are not subject to jurisdiction of another independent regulatory body; and, given the 7- or 15-day notice period, such tariffs would likely not have been found to be lawful by the Commission.

The Commission apparently has relied upon these cases because each court says that there is nearly unanimous agreement by the courts "that the word 'deemed' when employed in statutory law establishes a conclusive presumption." *See Order* at ¶19 and fn. 61 citing *Ohio Power Company v. FERC*, 954 F.2d at 782; *see* also *Municipal Resale Service Customers v. FERC*, 43 F.3d at 1053. The Commission's reliance here is misplaced. As AT&T points out there are a number of court decisions finding that the word "deemed" establishes only a rebuttable presumption. AT&T's Petition at 6, fn. 16.

In any case, the Commission's interpretation of Section 204(a)(3) is totally inconsistent with other provisions of Title II and the Commission's regulatory policies adopted thereunder. When viewed in such context, Section 204(a)(3) simply imposes a Congressional mandate upon the Commission to "speed up implementation of LEC tariffs." *NPRM* at ¶14. It does not endow LEC tariffs with some immutable status.

Section 204(a)(3) allows the LECs to file tariffs "on a streamlined basis." Under Commission regulation, such tariffs are filed on short notice and are presumed to be lawful. Although they can be suspended, the standards for securing a suspension -- modeled on the demonstration necessary to secure a stay or preliminary injunction from a court -- are difficult to meet. But regardless of whether the presumption of lawfulness limits the ability of parties to secure a suspension of a streamlined tariff at the pre-effectiveness tariff review stage, parties are still able to rebut such presumption in a subsequent Section 208 complaint and, if successful, seek damages as provided for under Section 207.

Clearly, the use of the term "streamlined" in Section 204(a)(3) strongly suggests that Congress meant for the Commission's long-established tariff review regime applicable to nondominant carriers to apply to certain LEC tariff filings. There is nothing to indicate that Congress meant to adopt anything different, especially since Congress did not amend

Section 208 to prevent challenges to the streamlined tariffs of the LECs or exempt the LECs from liability for damages under Section 207 for such tariff filings found to be unlawful. *See* MCI Petition at 6-10.

Moreover, the Commission's reading of Section 204(a)(3) would lead to a result that cannot remotely be viewed as furthering the public interest. Because the LECs are dominant, their service offerings are not subject to the discipline of the competitive marketplace.[1] Nonetheless, by granting the LECs immunity under Section 207, the Commission has effectively eliminated the one statutory tool available to LEC customers and competitors to try to prevent the LECs from exploiting their dominance. The Commission's *Order* does not offer any explanation as to why it is in the public interest to afford the dominant LECs the freedom to charge unlawful rates or impose unlawful terms and conditions secure in the knowledge that they will never have to "pay-back" the rewards they reap by engaging in such unlawful actions to their victims by way of damages. *See* AT&T Petition at 9.

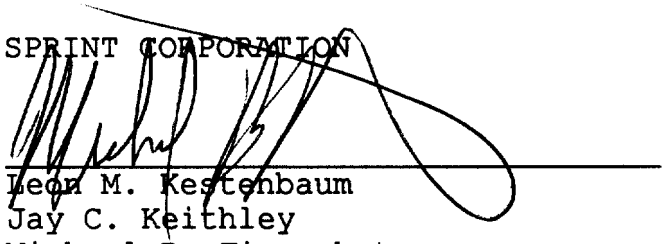
Finally, just as there is no justification either in Section

[1] In contrast, nondominant carriers lack the market power to engage in actions that are violative of the Act. Yet, the tariffs of such carriers can be challenged under Section 208 and the damages remedy afforded by Section 207 continues to be available to parties who are able to convince the Commission that a nondominant carrier has acted unlawfully. The Commission does not attempt to explain the "logic" of a decision that would continue to allow the damages remedy for the streamlined tariffs of nondominant carriers that lack the market power to charge unlawful rates or impose unlawful terms and conditions but not to the streamlined tariffs of dominant LECs that have the ability and incentive to exploit their dominance to the detriment of the public.

204(a)(3), its legislative history, or the public interest for the Commission's decision here to exempt the streamlined tariffs of the LECs from Section 207, there is no basis to grant SWBT's request to exempt LEC tariff filings entirely from challenge by parties in complaints filed under Section 208. SWBT claims that Section 204(a)(3) "provide[s] carriers with streamlined tariffs a 'safe harbor' in which they can operate without fear of post-effective attack upon their rates or tariffs." Petition at 3. However, it offers absolutely no support that Congress intended to provide LECs with such "safe harbor." Nor could it since Congress did not amend Section 208 to exempt the tariff filings of any carrier from challenge.

Respectfully submitted,

SPRINT CORPORATION



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April 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS AND OPPOSITION OF SPRINT CORPORATION** was sent by hand or by United States first-class mail, postage prepaid, on this the 10th day of April, 1997 to the parties on the attached list:

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